87 1873

87 1873

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY,
Petitioner,

VS.

ROBERT AREHART,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NICHOLAS W. HELDT
(Counsel of Record)
SEDGWICK, DETERT, MORAN & ARNOLD
One Embarcadero Center, 16th Floor
San Francisco, CA 94111
Telephone (415) 781-7900

Dated: May 12, 1988

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1441(c) confer jurisdiction upon the federal courts to hear claims involving no federal question between non-diverse parties when the claims have been joined with a separate and independent federal claim and removed from state to federal court?

2. Does an irrebuttable presumption of the existence and citizenship of fictitious parties, which negates the diversity jurisdiction of the District Courts, deny Due Process of Law and unconstitutionally interfere with access to the federal courts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Constitution

TABLE OF AUTHORITIES CITED

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY,
Petitioner,

VS.

ROBERT AREHART,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner The Dow Chemical Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 9, 1988.

PARTIES TO THE PROCEEDING

All parties to the procceding below remain as Petitioner and Respondent in this proceeding.

Petitioner is The Dow Chemical Company, a chemical manufacturer. (A list of related companies, pursuant to Rule 28.1, is attached as Appendix B.)

Respondent is plaintiff Robert Arehart who brought suit against Petitioner seeking damages for personal injury.

The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 342, was formerly a party to this action but was given judgment in the District Court, from which no appeal was

taken. The local union was not a party to the appellate proceeding of which Petitioner seeks review.

OPINION BELOW

The Court of Appeals decided this matter in an unpublished memorandum opinion which appears as Appendix A, hereto.

JURISDICTION

Jurisdiction of the District Court is the question presented by this Petition and was the question decided by the Court of Appeals. It was asserted that the District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a) (diversity of citizenship) and § 1441(c) (removal of a separate and independent federal claim). The opinion of the Court of Appeals for the Ninth Circuit was filed on March 9, 1988. On April 6, 1988, the Court of Appeals denied a timely petition for rehearing. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

STATEMENT OF THE CASE

Respondent Robert Arehart (plaintiff below) filed a complaint in California state court on March 4, 1985. The complaint sought damages for personal injuries against Local 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (hereinafter

the "Local Union"), against Petitioner The Dow Chemical Company (hereinafter "Dow") and against "Doe One through Fifty." In summary, the complaint alleged a violation of Union by-laws against the Local Union, alleged three claims under California common law against Dow, and alleged that "the fictitiously named defendants are in some manner responsible for the occurrence herein alleged."

On December 26, 1985, before Dow was served with the complaint, the action was removed by the Local Union to the District Court for the Northern District of California. In the removal petition, the Local Union asserted that the claims against it involved the Union's duty of fair representation of its members, arose under the laws of the United States, and were within the original jurisdiction of the federal courts. The removal petition also stated:

> Because this Court has original jurisdiction over the claim against Defendant/Petitioner [the Local Union], Petitioner is entitled to remove this case to this Court pursuant to 28 U.S.C. § 1441(a). In the alternative, removal is also appropriate under 28 U.S.C. § 1441(c) because the fourth cause of action, pled solely against Defendant/Petitioner, is a separate and independent claim or cause of action which, for the reasons stated in paragraphs 3 and 4 above, would be removable if sued on alone.

On March 19, 1986, again before service upon Dow, plaintiff filed a status conference statement in federal District Court, representing that the court had jurisdiction and that the Local Union and Dow were the only defendants who would be served:

> The Court has subject matter jurisdiction over the present matter. Defendant United Association of Pipe Fitters and Plumbers, Steamfitters' Union Local 342 (hereinafter referred to as Local 342) moved this Court to assume jurisdiction purusant to 28 U.S.C. 1337 and 29 U.S.C. 185. All parties except Dow Chemical Company have been served and Dow Chemical Company is presently being served.

No motion to remand was made. On April 1, 1986, again before service upon Dow, the case was assigned a trial date in March,

1987, and all parties were ordered to complete discovery by December 15, 1986.

Dow answered the complaint in District Court on June 3, 1986. Discovery was conducted. In January, 1987, Dow moved for summary judgment on the merits of the controversy, offering undisputed evidence that Dow had taken special precautions for the plaintiff's safety. At the same time the Local Union moved for summary judgment on the basis of the six month statute of limitations to make claims of breach of the duty of fair representation against a collective bargaining representative. Both motions for summary judgment were heard and granted on February 12, 1987.

From the judgment of the District Court, plaintiff appealed against Dow only. The Brief for Appellant, filed by Arehart on July 13, 1987, argued the merits of the case but also challenged the jurisdiction of the District Court:

> [A]s to jurisdiction, appellant submits that once the Trial Court made its ruling that the summary judgment was to be granted in favor of Local 342, the Trial Court lost federal jurisdiction.

Dow filed its Brief as Appellee on August 12, 1987, arguing the merits of the case and also pointing out that if the District Court had not acquired jurisdiction over Dow by virtue of the Local Union's removal petition, there was then diversity of citizenship between the only plaintiff, Robert Arehart, a California citizen, and the only defendant, Dow, a Delaware corporation with principal place of business in Michigan.

On November 16, 1987, the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, decided an unrelated matter known as *Bryant v. Ford Motor Co.*, 832 F.2d 1080 (1987). Before that decision, the naming of "Doe" defendants in a complaint filed in State Court did not prevent removal on the basis of diversity of citizenship if the defendant could show that the "Does" were wholly fictitious or that their joinder was a sham. *Bryant v. Ford Motor Co.* overruled that existing law and held "that the presence of Doe defendants under California Doe defendant law destroys diversity and, thus, precludes removal."

Bryant, supra, 832 F.2d at 1083. The essence of this holding, as a concurring opinion recognized, is the creation of an irrebutable presumption that Doe defendants are real and non-diverse to plaintiff:

> [T]he court effectively adopts a rule that Doe defendants are conclusively presumed to be real, not phantom or sham, and are conclusively presumed to be nondiverse.

Bryant, supra, 832 F.2d at 1084 (Norris, J., concurring). *Bryant* also instructed that:

> This new rule will apply retroactively. Federal courts should remand pending cases containing allegations against unnamed Doe defendants to state court unless both parties agree to dismiss the Doe defendants.

Bryant, supra, 832 F.2d at 1083 n.6.

At oral argument in the present case, presented on January 15, 1988, the Court of Appeals inquired concerning the effect of Doe defendants upon federal jurisdiction. Dow offered to show that the Doe defendants were wholly fictitious. This exchange was the first mention of Doe defendants by Court or counsel at any point since this matter had been in the federal courts.

On January 19, 1988, Dow filed a Supplemental Brief on Appeal pointing out, among other things, that the jurisdiction of the District Court had originally been invoked under 28 U.S.C. § 1441(c) under which "separate and independent" claims, not otherwise within federal jurisdiction, are properly removed to federal court when joined with a removable claim and that the presence or presumed citizenship of Doe defendants has no effect upon jurisdiction over the separate and independent claims under that statute. This has been the rule even when the "separate and independent claims" are against parties who are not also named as defendants in the claim providing the basis for removal.

On March 9, 1988, the Court of Appeals for the Ninth Circuit issued its Memorandum Opinion in this case (Appendix A), ruling that the District Court lacked jurisdiction. A Petition for Rehearing was filed on March 18, 1988, pointing out, among other things, that the decision was in conflict with this Court's

decision in *City of Gainesville v. Brown-Crummer Invest. Co.*, 277 U.S. 54 (1928), and the earlier decision of the Ninth Circuit in *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965). The Petition for Rehearing was denied on April 6, 1988.

REASONS FOR GRANTING THE WRIT

A. The decision of the Court of Appeals conflicts with the decisions of this Court and other Courts of Appeals concerning an important question of federal jurisdiction.

In this case, the Ninth Circuit Court of Appeals interpreted the statutory grant of jurisdiction to the federal courts in 28 U.S.C. § 1441 as not extending to separate and independent claims against "pendent parties," stating:

> [I]t is this court's long-held policy not to recognize pendent party jurisdiction absent an independent jurisdictional basis.

(Appendix A, Memorandum opinion 7:11-13).

This decision squarely conflicts with the decision of this Court in *City of Gainesville v. Brown-Crummer Invest. Co.*, 277 U.S. 54 (1928). In that case a controversy arising under state law between parties of diverse citizenship was joined in one proceeding with a separate controversy arising under state law between non-diverse parties including, as the Court of Appeals felt was the case here, parties joined in no claim that would fall within the original jurisdiction of the federal courts. The case was removed from state court to federal court which, like the District Court in this case, heard and decided the entire matter. On appeal, the Court of Appeals for the Fifth Circuit, like the Court of Appeals in this case, held there was no jurisdiction over the non-diversity claims. On writ of certiorari this Court held that the separate and independent claims, over which there was no original federal jurisdiction, were within the jurisdiction of the federal courts by virtue of the removal statute. This Court held that the appellate court was compelled to entertain the appeal on the merits. *City of Gainesville, supra*, 277 U.S. 54, 60 (1928).

The lower federal courts have uniformly followed the decision in *City of Gainesville* until the decision in this case. *See, e.g.,*

Texas Employers Ins. Assn. v. Felt, 150 F.2d 227, 233 (5th Cir. 1945); *Preston v. Kaw Pipe Line Co.*, 128 F.2d 162, 163-64 (10th Cir. 1942); *Sewell v. J.E. Crosbie, Inc.*, 127 F.2d 599, 602 (8th Cir. 1942); *Bailey v. Texas Co.*, 47 F.2d 153, 155 (2d Cir. 1931). In fact, one lower court has held that a defendant seeking to remove a claim to federal court *must* remove the entire case under 28 U.S.C. § 1441, including the separate and independent claims not within original federal jurisdiction. *Morschauser v. American News Company*, 158 F.Supp. 517, 520 (S.D.N.Y. 1958).

Prior to the decision in this case, the Ninth Circuit Court of Appeals had also followed *City of Gainesville*. In *Murphy v. Kodz*, 351 F.2d 153 (9th Cir. 1965), the plaintiff filed suit in state court against a federal officer and against two private citizens under state law. There was no diversity of citizenship nor any federal claim asserted against the private citizens. The federal officer removed the action to federal court where the entire matter was tried. The jury returned a defense verdict in favor of the federal officer but was unable to agree on the liability of the private citizens. A judgment was entered in favor of the federal officer and the case proceeded to a new trial against the private defendants. At the time of the second trial there was no basis of federal jurisdiction other than the fact that the pending claims had formerly been joined with a removable claim and all the claims had been brought to federal court under 28 U.S.C. § 1441(c), as in this case. Relying on this Court's decision in *City of Gainesville*, the Ninth Circuit held that there was federal jurisdiction over the entire controversy, stating:

> [W]e hold that the entire case in both its federal and non-federal facets was properly removed and that jurisdiction of the District Court was not ousted when the federal removal predicate was subsequently dropped from the proceedings.

Murphy v. Kodz, 351 F.2d 153 (9th Cir. 1965).

This Court has unequivocably declared that, "the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.' " *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); quoting from *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nonethe-

less, the Ninth Circuit has declared its hostility to pendent party jurisdiction and has refused to recognize a clear statutory grant of such jurisdiction, in conflict with the decision of this Court in *City of Gainesville v. Brown-Crummer Invest. Co.*, 277 U.S. 54 (1928). Review by writ of certiorari is appropriate both because of the conflict with the decision of this Court, and because of the importance of preserving access to the federal courts.

B. An irrebuttable presumption of a fact that negates federal jurisidiction raises grave constitutional questions of due process and of the right to petition for grievances.

California state law permits a plaintiff to proceed against fictitiously named defendants:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. . . .

California Code of Civil Procedure, Section 474; *see*, Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 Stan.L.Rev. 51 (1977). So-called "Doe" defendants are named in virtually every civil case filed in California State courts. *Bryant v. Ford Motor Co.*, 832 F.2d 1080, 1086 (9th Cir. 1987) (Kozinski, J., dissenting). In the past, the naming of "Doe" defendants may, or may not, have prevented removal to federal courts on the basis of diversity of citizenship, depending on whether it could be shown that the Doe defendants were real or phantom, and depending on whether a cause of action was specifically stated against the Doe defendants. *See, Hartwell Corp. v. Boeing Co.*, 678 F.2d 842 (9th Cir. 1982), and *Grigg v. Southern Pacific Co.*, 246 F.2d 613 (9th Cir. 1957), both overruled by *Bryant v. Ford Motor Co.*, 832 F.2d 1080, 1083 (9th Cir. 1987). Now, under the rule adopted in *Bryant v. Ford Motor Co., supra*, all Doe defendants are conclusively presumed to be real and nondiverse.

> [T]he court effectively adopts a rule that Doe defendants are conclusively presumed to be real, not phantom or sham, and are conclusively presumed to be nondiverse.

Bryant v. Ford Motor Co., supra, 832 F.2d at 1084 (Norris, J., concurring).

The rule adopted by the Ninth Circuit in *Bryant* has the effect of negating federal jurisdiction for fictional reasons in a large number of cases. In adopting the irrebuttable presumption, the Ninth Circuit made no attempt to determine the extent to which the presumption mirrored or departed from reality, except to say it would not assume that Doe defendants are "procedural fictions" in the "vast majority" of cases, as the dissent urged. *Bryant, supra*, 832 F.2d at 1083 n.5. Moreover, the Ninth Circuit offered no justification for the presumption other than the difficulty of case-by-case determinations. *Bryant, supra*, 832 F.2d at 1083.

Irrebuttable presumptions have long been disfavored under the Due Process clauses of the Fifth and Fourteenth Amendments. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

> [A]dministrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts.

Id at 451. Moreover, this Court has suggested that presumptions which interfere with "interests of constitutional fundamentality" are subject to strict judicial scrutiny. *Mathews v. Lucas*, 427 U.S. 495, 504 n.8 (1976). The right to petition the government for a redress of grievances under the First Amendment includes the right of access to the courts and is of fundamental constitutional importance. *California Motor Transport Co. v. Trucking Unlimited*, 414 U.S. 508, 510 (1972).

The irrebuttable presumption adopted by the Ninth Circuit dramatically restricts the legitimate scope of its diversity jurisdiction by preventing the exercise of jurisdiction in large numbers of cases in which such jurisdiction actually exists. Thousands of otherwise removable cases can now not be removed to federal court based on a fiction presumed to be real. The retroactive effect of the presumption highlights the extent to which the rule departs reality; in cases having Doe defendants which have already been removed because a non-resident defendant was able to satisfy the court that the Doe defendants were a sham, that

factual determination is retroactively overturned in favor of an irrebuttable presumption that these proven phantoms are, instead, real.

This case offers an illustration of the retroactive conversion of fiction to reality. After removal to federal court, plaintiff made no effort to serve the complaint upon any Doe defendant and instead informed the District Court that the court had subject matter jurisdiction and that Dow and the Local Union were the only defendants. While it is true that the parties may not confer jurisdiction by acquiescence, nonetheless this Court has held that:

> The action of the party in acquiescing may strengthen inferences of necessary facts from the record to sustain the jurisdiction, in the absence of a showing to the contrary.

City of Gainesville v. Brown-Crummer Invest. Co., 277 U.S. 54, 59 (1928). Following the plaintiff's apparent acknowledgment in this case that the Doe defendants were not real, the District Court action proceeded to judgment on the merits in favor of the defendant. On appeal the Ninth Circuit arbitrarily and irrebuttably bestowed life and reality upon acknowledged phantoms to nullify the judgment on the merits and to remand the matter to state court where the defendant will once again be burdened with the defense of a lawsuit it has already won in a court that truly had jurisdiction.

The impact of *Bryant* upon the exercise of diversity jurisdiction in the federal courts sitting in California cannot be overstated. Literally thousands of cases, of which this is one, are being sent back to state court to start over afresh. Existing orders and judgments in those cases are now void for want of jurisdiction. *Bryant* has the effect of abrogating diversity jurisdiction in cases filed in California state courts. The editors of *California Lawyer* (published in cooperation with the State Bar of California) commissioned a survey of the federal judges sitting in California concerning their response to *Bryant*. In an article by William Slomanson entitled "John Doe Strikes Out in the Ninth," *California Lawyer*, May 1988 (attached as Appendix C, reprinted with permission) the following comments are attributed to a judge and to a magistrate responding to the survey:

> "We don't need the business," said one judge in the survey. But he also added, "We ought not to be looking for ways to circumvent all diversity jurisdiction." A magistrate commented that it is up to Congress, not the courts, to "get rid of diversity jurisdiction."

(*Id.*, Appendix C). One District Court has already declined to follow a portion of the *Bryant* decision as dicta. *Bertha v. Beech Aircraft Corp.*, 674 F.Supp. 24 (C.D. Cal. 1987).

Bryant has only recently completed its odyssey through the Ninth Circuit. Petitioner is informed that the Ninth Circuit Court of Appeals amended its opinion in *Bryant* on April 15, 1988, in response to another petition for rehearing and currently that court has stayed the mandate in *Bryant* to enable the defendant to prepare a petition for certiorari to this Court. It is contemplated, therefore, that this Court will have the opportunity to review *Bryant* directly, as well as indirectly through this case, one of its progeny. Petitioner emphasizes, however, that this case bears an important factual distinction from *Bryant* which may make it useful to review both decisions together: in *Bryant* the plaintiff had identified and wished to serve certain real entities as Doe defendants; in this case, in the District Court, the Doe defendants were acknowledged to be, and are to this day, phantoms.

CONCLUSION

In derogation of its jurisdiction, the Ninth Circuit has dramatically and radically departed from existing precedent, in the decisions of this Court and in its own decisions, on two separate jurisdictional issues. The rules applied in this case are also currently being applied to evict thousands of lawful occupants from the federal courts and will close the doors of the federal courts to thousands more in the future. Petitioner urges the Court to review this case in order to preserve meaningful access to the federal courts for the thousands who are situated the same as Petitioner.

NICHOLAS W. HELDT
(Counsel of Record)
SEDGWICK, DETERT, MORAN & ARNOLD
One Embarcadero Center, 16th Floor
San Francisco, CA 94111
Telephone (415) 781-7900

(Appendices follow)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-1840
D.C. No. C 85 9368 JPV

Robert Arehart,
Plaintiff-Appellant,

vs.

The Dow Chemical Company, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
John P. Vukasian, District Judge Presiding

Argued and Submitted January 15, 1988
San Francisco, California

MEMORANDUM*

[Filed March 9, 1988]

Before: GOODWIN, NELSON, Circuit Judges, and GILLIAM,** District Judge

Robert Arehart brought an action against his union, the United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada, Local Union 342 (Union), the Dow Chemical Company (Dow), and fifty unidentified Doe defendants. The gist of Arehart's complaint was that the Union and Dow were liable for injuries Arehart sustained at his place of employment. The district court entered summary judgment for the Union and Dow. Arehart now appeals

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

from the entry of summary judgment in favor of Dow. We reverse.

FACTS

Robert Arehart was a journeyman pipefitter and a member of the Union. The Union had negotiated a collective-bargaining agreement with the PMI Corporation (PMI), an enterprise that included pipefitters among its employees.

Over the course of several years, Dow had contracted with PMI to do a number of maintenance-related projects at a Dow chemical plant in Pittsburg, California. On March 15, 1984, PMI was performing maintenance work for Dow at the chemical facility. On that afternoon, PMI contacted the Union and requested that a pipefitter be dispatched to PMI at the Dow facility in Pittsburg. The Union dispatched Arehart in response to PMI's request.

At the Dow facility, Arehart's task was to install "blinds" in piping connected to a distillation column; the distillation column was identified by the designation "B105." To install the blinds, a pipefitter would unbolt the pipe flange from the flange on the B105's side. A solid barrier would be inserted between the flanges, and the flanges would be bolted back together. The installation of the blinds was designed to isolate the piping from the interior of the B105 to prevent water from entering the pipes when the inside of the B105 was washed.

Before PMI employees were asked to install the blinds, Dow employees attempted to purge the B105 of any chemicals it contained. During operation, the B105 contained chlorine and hydrogen chloride. Dow displaced those chemicals with nitrogen gas by inserting for several hours a continuous flow of the gas into the B105. After the nitrogen gas was inserted into the B105, a Dow employee opened a vent on the B105 to watch for any signs of escaping gases and to smell the vent for any odor of gas. After performing this check, the Dow employee concluded that the chlorine and hydrogen chloride had been purged from the B105 and that the B105 contained only nitrogen. Dow then gave control of the B105 to PMI. Red tags were placed on ancillary piping to ensure that no Dow employee tampered with any of the piping.

When Arehart reported to PMI on the afternoon of March 15, 1984, he was asked to shave a portion of his moustache so that he could use effectively a respirator. He was issued various items of safety equipment, and he was sent with a PMI colleague to install the blinds.

After Arehart and his colleague had begun installing the blinds, they decided to wear full-face respirators as an additional safety precaution. Arehart's colleague obtained two full-face respirators from the PMI construction yard, and he and Arehart wore the respirators while they worked on the blinds.

Arehart had been working on the blinds for a number of hours when he was exposed to gas from the B105. He was taken to a hospital, treated for gas inhalation, and released two days later.

On March 4, 1985, Arehart filed a complaint in state superior court against the Union and Dow. The gist of his complaint against the Union was that the Union had a duty to instruct and train its members, including Arehart, in the proper use of gas masks and in the proper manner of avoiding exposure to chemical substances. The complaint alleged that Dow was vicariously liable for the negligence of PMI under the "peculiar risk of harm" doctrine, that Dow was liable for negligently contracting with an incompetent company—PMI, and that Dow was liable for negligence in the operation of premises over which Dow had retained control.

The Union, pursuant to 28 U.S.C. § 1441(a) (1982), removed the case to federal court in December 1985 on the ground that Arehart's allegations against the Union raised a federal question under the National Labor Relations Act, 29 U.S.C. §§ 141-187 (1982). Arehart had not served Dow with the complaint at that point, and Dow therefore did not make any showing of federal subject matter jurisdiction. Arehart did not object to the removal, and he made no motion to remand the case to state court.

Both the Union and Dow moved for summary judgment in federal court. The district court heard and granted those motions on February 12, 1987. Judgment was entered in favor of Dow and the Union on March 26, 1987, and plaintiff filed a notice of appeal on March 26, 1987. Plaintiff amended his notice of appeal on

April 2, 1987, to clarify that he was only appealing from the entry of summary judgment in favor of Dow.

DISCUSSION

Arehart claims that the district court had no subject matter jurisdiction to hear his causes of action against Dow and that, therefore, the district court erred in granting Dow's motion for summary judgment. Dow, on the other hand, contends that Arehart and Dow were citizens of different states, giving the district court diversity jurisdiction.

In determining whether the district court had subject matter jurisdiction to hear Arehart's causes of action against Dow, we need look no further than this Court's recent decision in *Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987) (en banc). In *Bryant*, an en banc panel of this court held: "the presence of Doe defendants under California Doe defendant law destroys diversity and, thus, precludes removal. The nature of the allegations against such Doe defendants is irrelevant for federal removal purposes." *Id.* at 1083. The court's holding shielded district courts from having to make the "near-impossible determination of when the allegations against Doe defendants are 'specific' enough to defeat diversity." *Id.*

The procedural history in the *Bryant* case is similar to the history of the instant case. There, the plaintiff brought an action for personal injuries against the Ford Motor Company (Ford) and fifty Doe defendants. Ford moved for summary judgment, and the district court granted Ford's motion. Plaintiff appealed the district court's grant of summary judgment. A three-judge panel of this court remanded the case to the district court on the ground that because Doe defendants were present in the complaint the district court could not determine whether the Doe defendants would defeat diversity jurisdiction once identified. *See id.* at 1081.

A petition for rehearing was filed with the panel, and the Ninth Circuit Court of Appeals agreed to hear the case en banc. The court en banc held that the presence of Doe defendants defeats diversity jurisdiction. *See id.* at 1083. In addition, the en banc court held that the new rule would apply retroactively, *see id.* n.6,

thereby requiring federal courts to remand to state court pending cases containing allegations against unnamed Doe defendants unless the parties agree to dismiss the Doe defendants or those defendants are "unequivocally abandoned."[1] *See id.* at 1083.

Here, Dow contended in supplemental briefing that Arehart had unequivocally abandoned the Doe defendants. To support this contention, Dow pointed to Arehart's status conference statement, in which Arehart stated that "[a]ll parties except Dow . . . have been served." Appellee's Second Supplemental Excerpt of Record at 76. According to Dow, this statement is evidence that Arehart had no intention of naming any of the unidentified Doe defendants.

As mentioned above, "unequivocal abandonment" exists in only two circumstances: where the plaintiff drops the Doe defendants from the complaint or where the trial commences without service of the Doe defendants. *Bryant*, 832 F.2d at 1083 n.5. Here, Arehart neither dropped the Doe defendants from his complaint nor commenced trial without service of the Doe defendants. In fact, Arehart stated at oral argument that he intended to conduct additional discovery and to amend his complaint to name some of the unidentified Doe defendants. Thus, we cannot find that Arehart unequivocally abandoned the Doe defendants. Rather, we find the court's opinion in *Bryant* controlling in this case. There were Doe defendants present in Arehart's complaint, and the Doe defendants had not been dismissed or "unequivocally abandoned." Thus, pursuant to *Bryant*, the district court did not have diversity jurisdiction to entertain plaintiff's suit against Dow.

Dow also argued in its supplemental brief that this court has pendent jurisdiction to hear Arehart's causes of action against Dow. Dow, however, appears to have confused pendent claim jurisdiction with pendent party jurisdiction.

---

[1] The court stated that "unequivocal abandonment" occurs in just two circumstances: (1) where the plaintiff drops the Doe defendants from the complaint, or (2) where the trial commences without service of the Doe defendants. *Bryant*, 832 F.2d at 1083 n.5.

Under pendent claim jurisdiction, a state claim against a defendant may be added to a pending federal claim against the same defendant. *Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999, 1000 (9th Cir. 1984). This basis of jurisdiction is premised on the fact that the defendant is already properly in federal court. This premise, however, does not apply to pendent party jurisdiction, where the defendant is not already in federal court on a federal claim.

In this case, Dow contends that the district court had pendent party jurisdiction from the federal claim against the Union to entertain Arehart's state law causes of action against Dow. We disagree. "This circuit historically has been hostile to the concept of pendent party jurisdiction." *Safeco Ins. Co. v. Guyton*, 692 F.2d 551, 555 (9th Cir. 1982). In fact, this court has held "that pendent jurisdiction does not permit a new party to be added to a case absent an independent jurisdictional basis." *Carpenters*, 738 F.2d at 1000. Here, there was no such independent jurisdictional basis, and the district court consequently had no pendent jurisdiction to entertain Arehart's causes of action against Dow.

Dow argued orally that the Doe defendants in Arehart's complaint were fictitious and that we should dismiss the Does to perfect subject matter jurisdiction. In the *Bryant* opinion, however, this court overruled the exception to want of diversity jurisdiction that existed where the named defendants prove that the Doe defendants are wholly fictitious. *Id.* at 1082. As mentioned above, the holding in *Bryant* prevented district courts from having to look behind the face of the pleadings to make the "near-impossible determination of when the allegations against Doe defendants are 'specific' enough to defeat diversity." *Id.* at 1083. Thus, this court has already determined that district courts are not in the position to determine whether the allegations against the Doe defendants are "wholly fictitious." Appellate courts, which are far removed from discovery and the pretrial process, are in an even worse position to make such a determination. We decline to engage in such an endeavor.

Our conclusion that the district court lacked subject matter jurisdiction to hear Arehart's causes of action against Dow renders it unnecessary for us to determine whether the district court

erred in determining that there was no triable issue of fact. It also nullifies our need to determine whether the petition for removal should be amended to reflect the diversity of citizenship between Arehart and Dow, because amending the removal petition would not cure the Doe-defendant defect.

In conclusion, we find that the district court was without subject matter jurisdiction to hear plaintiff's causes of action against Dow. Because there were Doe defendants named in the complaint that had not been dismissed or "unequivocally abandoned," the district court had no diversity jurisdiction. *Bryant*, 832 F.2d at 1083. And it is this court's long-held policy not to recognize pendent party jurisdiction absent an independent jurisdictional basis. *Carpenters*, 738 F.2d at 1000. There was no independent jurisdictional basis here. The district court, therefore, erred in entertaining Arehart's causes of action against Dow. Consequently, the district court should have remanded to state court Arehart's causes of action against Dow.

REVERSED and REMANDED.

APPENDIX B

Related Companies (except wholly owned subsidiaries) of The Dow Chemical Company

Name	Location
Alamo Land Company Inc.	Louisiana
Arabian Chemical Company	Saudi Arabia
Compagnie des Services Dowell Schlumberger	France
DCU/LB TRUST	California
Cromarty Petroleum Company Limited	United Kingdom
Scotdril Offshore Company	Scotland
Chimtrade	Bulgaria
Transformadora de Etilono S.A.	Spain
MT Partnership	Canada
Dowell Schlumberger Canada Inc.	Canada
Fort Saskatchewan Ethylene Storage Limited Partnership	Canada
H-D Tech Inc.	Canada
Wabiskaw Explorations Ltd.	Canada
Chief Shipping Company	Liberia
Haeger and Kaessner Limited	Japan
Viopol S.A.	Greece
Ulsan Pacific Chemical Company Ltd.	Korea
Dow Corning Corporation	Michigan
Dowell Schlumberger Corporation	Panama
Dowell Schlumberger Incorporated	Delaware
El Dorado Terminals Company	New Jersey
Insul/Crate Company, Inc.	Wisconsin
ISOPOR—Companhia Portugesa de Isociantos Ltda.	Portugal
Joliet Marina Terminal Trust Estate	Illinois
M.D. Kansei Limited	Japan
Funai Pharmaceuticals Company Ltd.	Japan
First Chemical Factoring S.p.A.	Italy
Laboratories Industriales Farmaceuticos Ecuatorianos (L.I.F.E.)	Ecuador
MDP (Holdings) Ltd.	United Kingdom
Metal Mark, Inc.	Illinois
Fort Saskatchwan Ethylene Storage Corporation	Canada
Oronzio de Nora Impianti Elettrochimici S.A., Lugano	Switzerland
Oronzio de Nora Technologies B.V.	Netherlands
Oroznio de Nora Technologies S.p.A.	Italy
P.T. Pacific Chemicals Indonesia	Indonesia
Pacific Chemicals Berhad	Malaysia
Pacific Chemicals (Pakistan) Ltd.	Pakistan
Pacific Plastics (Thailand) Limited	Thailand
Petroquimica-Dow S.A.	Chile
The Cynara Company	Texas
Eurosemences, S.A.	France
Vorakim Kimya Sanayi VE Ticaret A.S.	Turkey
Zip Pak Incorporated	Delaware

APPENDIX C

JOHN DOE STRIKES OUT IN THE NINTH

The Ninth Circuit's rule on Doe defendants raises more questions than it answers

by WILLIAM R. SLOMANSON*

The Ninth Circuit has a new approach to Doe defendants: The presence of these fictitious parties destroys diversity and thus precludes removal from state to federal court. The court's en banc holding in *Bryant v Ford Motor Co.* (1987) 832 F2d 1080, abolished the various exceptions that previously tolerated Does in federal court.

Bryant offers some tactical advantages to both plaintiffs and defendants. A plaintiff can keep his case from being removed to federal court as long as he sues Does, even if the Does are only procedural phantoms included to allow a real party to be substituted without violating the statute of limitations. On the other hand, a defendant may now threaten removal well after the 30-day period that started with service of the complaint.

The principal beneficiaries of *Bryant*, however, are federal judges. For years they have been forced to examine obscure facts and motives to establish the residence or existence of unnamed defendants. *Bryant*'s "bright-line" rule means they will no longer have to scrutinize pleadings containing Doe defendants in cases removed from California state courts.

"I enthusiastically welcome the *Bryant* decision," said one judge responding to a survey on the ruling (See "What Judges Think of *Bryant*," p 53). "It will save enormous amounts of non-productive time and will avoid the necessity of deciding jurisdic-

---

* *William R. Slomanson teaches civil procedure at Western State University's San Diego campus.*

tion on the basis of which form book the plaintiff used for his complaint."

Unfortunately, the procedural simplicity of *Bryant* has opened a substantive can of worms for judges and lawyers alike.

Because diversity jurisdiction exists only when there is complete diversity of citizenship between all plaintiffs and all defendants, the presence of Doe defendants raises jurisdictional questions when California cases have been removed to federal court. By definition, one cannot know if an unidentified Doe is a citizen of the same state as any plaintiff. Thus the general rule in the Ninth Circuit has been to remand diversity cases that include Doe allegations.

The principal significance of *Bryant* is that it explicitly overrules every previously recognized exception to the general rule. Its bright-line rule now prohibits the removal of "all" cases containing Doe allegations. The reason for pleading their presence, the court held, is "irrelevant."

The majority opinion in *Bryant* creates irrebuttable presumptions in federal court that Does are real persons and are not diverse. Unless one of those presumptions has been proved false before the case reaches the federal court, a diversity case with Does must be remanded. One result is that *Bryant* has changed the timing of removing cases.

Federal law allows a defendant to remove a case to federal court within 30 days of receiving a pleading or other paper from which federal jurisdiction can be ascertained. In most cases, that has meant within 30 days of service of the complaint. Under *Bryant*, however, the 30-day period does not begin running until all Does are:

- named by the plaintiff,
- unequivocally abandoned by the plaintiff, or
- dismissed for failure to serve them under California's three-year diligent prosecution statute.

A defendant may thus allow a case to proceed in state court for up to three years before removing the case to federal court.

Federal Trial Judges have developed several responses to *Bryant*. Some are using the bright-line rule to remand all Doe diversity cases. These cases then take their place at the end of the line on state court civil active lists.

Other judges have retained Doe cases by holding hearings permitting the parties to agree to dismiss the fictitious defendants. Under *Bryant*, "Courts should remand pending cases . . . to state courts unless both parties agree to dismiss the Doe defendants." Ironically, post-removal agreements allow the parties to confer jurisdiction when *Bryant* says none exists. Some judges have avoided this conceptual problem by immediately dismissing the Does without a hearing and proceeding with the case. Judges in California's Southern District have instructed the clerk of court not to accept filings containing Doe allegations.

There is another side to these simple procedural alternatives available to the federal courts. In his response to our survey, one judge in the Central District of California called *Bryant* "a nightmare for the parties.

Ninth Circuit Judge Alex Kozinski portrayed some of the scenes in that nightmare in his dissent in *Bryant*. He complained that the ruling will have an adverse impact upon federal-state relations by frustrating the goals of early removal. *Bryant* also creates inconsistency among the circuits on removal practice. Kozinski says Congress expressly limited removal to 30 days from service of the complaint.

Kozinski further stresses the rationale for the exceptions that previously allowed Does in federal court. He argued that the majority did not refute the reason for the exceptions. It is necessary, for example, to include Doe defendants in state court to avoid malpractice for failing to sue a party who may be liable. Kozinski notes that such procedural fictions do not interfere with federal practice.

Among the exceptions to the general bar against Doe defendants in the U.S. Supreme Court's statement almost 50 years ago that it "is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for

that reason should not be considered in determining the right to remove." *Pullman Co. v Jenkins* (1939) 305 US 534.

Under the majority's approach, the dissent says, Doe defendants who " 'live not and are accused of nothing' are now given substance for the purpose of deferring or defeating removal." Kozinski proposed the opposite bright-line rule—that Does should never defeat diversity unless it is shown they are real and not diverse.

The majority claims its decision gives plaintiffs a new incentive to agree to dismiss Doe defendants early in the litigation. Because removal may occur at any time within the three-year diligent prosecution period—even as late as the first day of trial—the plaintiff who retains fictitious Doe defendants is actually waiting in two lines. He may be ready for trial in state court when the case is suddenly removed to federal court.

Another incentive for early removal is the Trial Court Delay Reduction Act, which requires 98 percent of state court cases to be disposed of within one year of filing. Although there is some controversy over the new law's effectiveness, it seems clear that defendants will have to remove cases closer to the filing date in those counties implementing the "fast track" legislation.

The *Bryant* dissent questions the majority's definition of "unequivocal abandonment" of Doe defendants by the plaintiff. In a footnote, the majority says unequivocal abandonment occurs "(1) where the plaintiff drops the Doe defendants from the complaint [express abandonment] or (2) where the trial commences without service of the Doe defendants [implied abandonment]."

The dissent laments that the majority's definition of abandonment "covers a wide variety of situations, not just the two enumerated in footnote 5 of the court's opinion." Would unequivocal abandonment be shown by a letter from the plaintiff to the defendant purporting to eliminate Does? Can abandonment be implied from the plaintiff's failure expressly to deny the defendant's request for an admission that no further Does will be served, or from form at-issue memoranda providing that all "essential" parties have been served and that the plaintiff is "unaware" of any unserved party that may be added to the case?

The *Bryant* majority is silent on these possibilities. The Ninth Circuit's only clarification since *Bryant* has been a declaration that the mere running of the statute of limitations does *not* result in unequivocal abandonment. *Hise v Garlock* (No. 88-3529) 88 LADJ DAR 3216.

Another problem results from the fact that *Bryant* requires remand of all pleadings containing Doe allegations. The case actually addresses only those cases in which removal is predicated upon diversity of citizenship. California pleadings may contain Doe allegations as a preventive measure in two other situations.

First, a claim that raises a federal question may be within the concurrent jurisdiction of both state and federal courts. The presence of Does is irrelevant because removal exists without regard to citizenship. Counsel probably can presume that the *Bryant* court did not have this situation in mind when it said that the nature of the Doe allegations is "irrelevant."

Second, some state court actions are susceptible to removal on the joint bases of diversity and federal question jurisdiction. Under *Bryant* the "diversity" Does (and non-federal claim) should be remanded. Trial judges in this circuit no longer have discretion to retain them as pendent parties to the remaining federal claim. The federal question should not be remanded, however, even if there are Doe defendants named. Federal courts do not have the discretion to avoid claims within their original subject matter jurisdiction.

Even if the courts allow removal of federal question claims against Doe defendants, however, there remains a question about how to apply the statute of limitations. Federal Rule of Civil Procedure 15(c) bars the addition of any defendant unless "within the period provided by law for commencing the action" that party "knew or should have known that . . . the action would have been brought against [that party]."

The U.S. Supreme Court recently held that rule 15(c) *excludes* any additional period for diligent service of process beyond the expiration of the statute of limitations. *Schiavone v Fortune* (1986) 106 S Ct 2379. Two days earlier, however, the court had denied certiorari in a Ninth Circuit case holding that plaintiffs

can add diverse Doe defendants after removal when they did not receive notice before the California statute of limitations had expired. *Lindley v Gen. Elec. Co.* (9th Cir 1986) 780 F2d 797.

Although *Lindley* characterized the supposed conflict between rule 15(c) and California's Doe practice as "bogus," a federal rule on point should pre-empt state procedure. *Hanna v Plummer* (1965) 380 US 460. A plaintiff's attempt to add California Doe defendants after removal should be barred unless the Does have been given rule 15(c) notice. Unfortunately, in its overhaul of Doe federal practice, the *Bryant* majority addressed neither *Lindley* nor *Schiavone.*

Perhaps the most substantial question about *Bryant* is its effect as stare decisis. "The court's bright-line rule is in large part dicta," Kozinski wrote in dissent, "and its binding force is therefore highly questionable." *Bryant* properly addressed whether the presence of Doe defendants prohibits removal because their citizenship cannot be determined. But the majority opinion also dealt with abandonment, despite the fact that the plaintiff had not abandoned his Does. On the contrary, Mr. Bryant was seeking permission to join Doe defendants after removal.

At least one court already has declined to apply *Bryant's* bright-line prohibition. In *Bertha v Beech Aircraft Corp.* (CD Cal 1987) 674 FSupp 24, the trial court rejected the plaintiff's motion to remand to state court. "*Bryant* seemingly would require remand of this case," the court said. Because the plaintiff's at-issue memorandum stated that all essential parties had been served and that no others would be served prior to trial, said the court, closer analysis revealed that "removal was both timely and proper and that remand should be denied."

One consequence of *Bertha* should be judicial reluctance to impose sanctions for frivolous removals until the Ninth Circuit clarifies *Bryant.* However, counsel should not read *Bertha v Beech Aircraft* as evidence that judges will try to circumvent *Bryant.* As the survey accompanying this article suggests, there are administrative reasons why the courts are embracing the opportunity to export and quarantine diversity Does.

The Ninth Circuit is the nation's busiest federal circuit, and California contributes more cases than any other state in the circuit. In 1987, 18 percent of the circuit's 40,853 new cases relied on diversity jurisdiction. By remanding many of those cases, *Bryant* decreased the federal case load.

"We don't need the business," said one judge in the survey. But he also added, "We ought not to be looking for ways to circumvent all diversity jurisdiction." A magistrate commented that it is up to Congress, not the courts, to "get rid of diversity jurisdiction."

With so many questions unanswered, it is obvious that the *Bryant* case is not over. There is going to be another hearing before the en banc court of appeals, and the case may reach the Supreme Court. Those courts will have to decide whether John Doe should stay buried or be disinterred.

What Judges Think of *Bryant*

A survey of California's federal trial judges and magistrates suggests that the officers who must implement the *Bryant* decision have mixed feelings about the case. About half (32) of the 66 judges responded, and five of the 19 magistrates returned our questionnaire.

The survey asked two questions: whether *Bryant* was decided properly, and whether there *should* be exceptions allowing defendants to remove cases containing Doe allegations.

Fifty-nine percent (22) of the respondents said *Bryant* was properly decided, while 22 percent disagreed. Almost 20 percent did not directly answer this question but expressed reservations short of disapproval. One judge, for example, responded that *Bryant* was decided "conveniently."

The breakdown was about the same for the second question. Fifty-six percent of the judges and magistrates (21) answered that cases containing Doe allegations should *never* be removed. This sentiment seemed to be in reaction to the way the former exceptions were applied. As one judge put it, "pre-*Bryant* rules

[allowing Doe exceptions] were simply too arcane and dependent upon the whim of the panel to be workable."

Asked to specify exceptions that should be made to the general anti-removal rule, the judges and magistrates offered four: when Does are clearly procedural, fictitious or sham; when the Does' citizenship becomes known; when the case is at issue and no Does have been served; and when the plaintiff "indicates" his belief that there are no remaining defendants.

—WILLIAM SLOMANSON